

# United States District Court Southern District of Texas

Case Number: H-04-2387

## ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part I of IV

☒ Exhibit(s) number(s) / letter(s) # 102

Other: Pltiff's First Amended Petition  
Habeas Corpus

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EXHIBIT 102

3 THE MARSHAL: What was the name again, ma'am?

4 MS. BRORBY: Allen Breed.

5 THE COURT: Please raise your right hand and be sworn,  
6 Mr. Breed.

7 ALLEN BREED, PLAINTIFFS' WITNESS, SWORN

8 THE COURT: Good morning, Mr. Breed.

9 THE WITNESS: Good morning, Your Honor.

10 THE COURT: When was the last time we saw each other?  
11 When you were an inspector for the youth correction system?

12 THE WITNESS: In Texas?

13 THE COURT: Yes. All right. You may proceed.

14 MS. BRORBY: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MS. BRORBY:

17 Q. Mr. Breed, will you state your name for the record?

18 A. Allen, middle initial F, Breed. B-R-E-E-D.

19 Q. Where do you live, Mr. Breed? Where do you live?

20 A. Outside a small town in the mother lode of California  
21 called San Andreas, California.

22 THE COURT: Are you right on the fault?

23 THE WITNESS: My response is, that's not our fault,

24 Your Honor.

25 BY MS. BRORBY:

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1 Q. What kind of work do you do, Mr. Breed?

2 A. I'm currently working as a consultant in criminal justice,  
3 with the primary emphasis on special mastering for state and  
4 federal courts.

5 Q. And in what aspect of criminal justice do you specialize?

6 A. For the last 15 years, almost entirely in the adult field,  
7 although, as I've already indicated to the Court, I have had  
8 several cases in the juvenile area as well.

9 Q. And would that be in the field of the -- of corrections,  
10 the incarceration of adults?

11 A. Entirely acting as a monitor, acting as a mediator, acting  
12 as a fact finder for the courts on assignment as a special  
13 master, using the generic term, special master.

14 Q. In what -- in what systems or institutions have you served  
15 in that kind of capacity as special master or fact finder for a  
16 court?

17 A. I think it would be laborious for all to go through it, but

18 suffice it to say that since my first assignment in the state of  
19 Rhode Island under Judge Pattine with the total adult  
20 correctional system, I've been involved in 31 other cases at  
21 both the state and federal court level.

22 Q. How many states have you been involved in, if you know?

23 A. I'd have to count them up, but it would certainly be in  
24 excess of 15.

25 Q. When did you first start working in the field of

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1 corrections?

2 A. In 1945, the end of 1945.

3 Q. And can you give us a thumbnail sketch of your correctional  
4 career?

5 A. Well, I was in the United States Marine Corps and waiting  
6 for admission to law school and became intrigued with what was  
7 being done in California in some of the correctional  
8 institutions, so accepted a temporary job as a correctional  
9 officer at Stockton Correctional Facility, and became so  
10 interested in what was being done in California in that regard  
11 that I never ended up in law school.

12 Q. Good for you. Where did you go from there?

13 A. After being in the Stockton Correctional Facility, I then  
14 opened the first forestry camp in California and stayed there  
15 for approximately eight or nine months, at which time I was  
16 promoted to the position of assistant superintendent in a  
17 juvenile institution called the Fricot Ranch School for Boys,

18 remained there for several years, and then took over as  
19 superintendent of the Coarse Gold Forestry Camp. I was there  
20 for some time and then was put in charge of all of the forestry  
21 camps in California.

22 From there, I was then promoted to superintendent of  
23 the Fricot Ranch School for Boys, remained there for a number of  
24 years, and then was transferred to the Preston School of  
25 Industry, which was a thousand-bed institution for 18- to

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1 25-year-old felons.

2 From there, I went to the central office and was  
3 appointed under both a Democratic governor, a Republican  
4 governor, and then another Democratic governor as the director  
5 of the Department of Youth Authority with a dual responsibility  
6 also as chairman of the Youthful Offender Board.

7 Q. How did you get into adult corrections?

8 A. I moved from -- I retired from California and went to  
9 Washington on a fellowship. After a short time, I was asked to  
10 come up and be a special master at the Rhode Island Correctional  
11 Institution. And although the Court did not take receivership,  
12 the judge desired to do so, I persuaded him not to do so. But I  
13 had the responsibility to hire and fire and to take a system  
14 that was at the time locked down for over 19 months, and did  
15 that for a little over a year, at which time I was appointed as  
16 director of the National Institute of Corrections, which has a  
17 primary responsibility for adult corrections, although by law it

18 also has the juvenile area. Our board determined that we would  
19 put 99 percent of our emphasis on the adult field, and for the  
20 next four and a half to five years, I worked closely with all of  
21 the correctional programs throughout the United States, the  
22 technical assistant aspect, and doing the primary research in  
23 the field of adult corrections, and in doing any type of service  
24 which would help corrections do their very, very difficult job.

25 I then retired from the federal government and

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1 returned to California and decided to use the experience that I  
2 had at the National Institute of Corrections and also the Rhode  
3 Island experience and become a special master. And since 1983,  
4 I have been doing that on a full-time basis.

5 MS. BRORBY: May I approach the witness, Your Honor?

6 THE COURT: I beg your pardon?

7 MS. BRORBY: May I approach the witness, Your Honor?

8 THE COURT: You may.

9 BY MS. BRORBY:

10 Q. Mr. Breed, is the document that I have handed you marked  
11 Plaintiffs' Exhibit 1519 your curriculum vitae?

12 A. Yes, it is.

13 Q. Did you prepare this document?

14 A. Yes, I did.

15 Q. Is it a true and correct summary of your training and  
16 experience that you consider relevant to your expertise in  
17 corrections?

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18 A. Yes, it is.

19 Q. Mr. Breed, here you are on the witness stand giving

20 testimony about what you have seen and heard in the Texas

21 Department of Criminal Justice and your opinion about that. How

22 did you come to be involved in this case in which you are now

23 testifying?

24 A. I was approached by plaintiffs' counsel to review the

25 conditions of confinement as an outgrowth of the motion made by

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1 defendants to dismiss the final judgment. I was intrigued  
2 because I was very familiar with the Ruiz case. I was also  
3 familiar with adult corrections during -- before and during that  
4 time. And although I am not a professional witness, I did feel  
5 that it was important to come down and review general conditions  
6 and then make a decision as to whether or not I would want to  
7 testify.

8 Q. In how many cases have you served as an expert witness for  
9 a party in litigation about prison conditions?

10 A. Over what period of time? Last four years, as was required  
11 by the federal rules?

12 Q. Well, we can start in the last four years.

13 A. I think that -- I think there was three cases which I have  
14 been an expert witness, yes.

15 Q. And what kind of cases were those?

16 A. One was a case for the district court in Arizona where the  
17 Court appointed me as an expert to report on conditions of

18 confinement. The second case was the district of Alabama, where  
19 I testified for the plaintiffs on the use of chain gangs and  
20 what they call a hitching post. The third case was in the  
21 northern district of Texas, where I testified for the defendants  
22 on a juvenile correctional institution case.  
23 Q. In the last ten years, how many other cases have you  
24 testified in as an expert witness, not for the Court, but for a  
25 party on either side?

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1 A. To the best of my knowledge, there's only been two. I  
2 testified for defendants, the Correctional Services of Canada,  
3 at the request of the commissioner. I testified on one other  
4 case where digital searches were being made of inmates, and that  
5 was a case in the state of Washington. Outside of that, I don't  
6 believe that I have served as an expert witness.

7 Q. In the -- in the 31 other cases that you mentioned that  
8 you've been involved in at the state and federal level, in how  
9 many of those cases were you working for the Court rather than  
10 for either party?

11 A. Only two.

12 Q. I'm sorry, I didn't hear you.

13 A. Well, would you repeat your question, please?

14 Q. I think you said there were 31 other cases in which you've  
15 been involved?

16 A. Yes.

17 Q. Of those, in how many of them were you retained by the

18 Court rather than by a party to the litigation?

19 A. I believe it would be accurate to state that in all cases,

20 I was appointed by the Court. In some of those cases, parties

21 had agreed and stipulated to my appointment, and the Court had

22 approved.

23 Q. You said that when you were retained, you agreed to

24 evaluate conditions in the TDCJ and then to provide an opinion

25 about whether you thought that there were any conditions that

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1 might result in testimony in the case. What was your  
2 methodology in conducting your study in TDCJ to determine what  
3 you thought about conditions?

4 A. I visited 18 prisons. In all cases, those visits involved  
5 two- to three-, and in some cases, four-day visits. At no time  
6 were the visits less than 12 to 14 hours a day. I would first  
7 comment that I wished I could have visited even more, but that  
8 there was a limitation, both in terms of time that was allowed.  
9 And it seems to me that we were able to have a cross-section of  
10 the major institutions. And I did a little arithmetic  
11 computation last night, and I found that those institutions'  
12 units that I visited represented about 32 percent of the total  
13 population.

14 In visiting these institutions, I wanted to  
15 particularly review safety issues, fairness issues, excess use  
16 of force issues. And I went about that by first reviewing over  
17 500 use of force reports. I reviewed over 600 grievances. I

18 reviewed over 500 discipline reports, and approximately 800  
19 institution files.

20 My process of then visiting the institution following  
21 a orientation to the program by the warden and his chief  
22 deputies would be a relatively short walking tour of the  
23 facility, and then branching out and concentrating on those  
24 areas in which I wanted to make my major emphasis.

25 I brought to that process years of experience, both

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1 from the California days when I always felt that a warden or a  
2 superintendent was only as effective as the very shadow of his  
3 being laid over that institution. I feel that you have to get  
4 out and walk them and talk to them and find out what's  
5 happening.

6 I actually borrowed from a man who was a good friend  
7 and a colleague, George Beto, who was known as Walking George.  
8 And Dr. Beto felt that you had to walk the tour -- tiers to know  
9 what was happening. So at each unit, what I did was walk the  
10 tiers, talk to inmates that wanted to talk to me, then go to the  
11 records and attempt to verify the best I could what I was  
12 hearing.

13 Unfortunately, I wasn't able to have the contacts with  
14 staff that I would like to have had, because early on it was  
15 made mandatory that there be a lawyer present at any time there  
16 is any communications between myself and any staff member. Even  
17 later when the lawyers no longer accompanied, it was mandatory

18 that a high ranking unit administrator accompany me.

19 When I tried to talk to staff, it was obvious that  
20 they found great difficulty in communicating with me when their  
21 boss was there listening to every word they said.

22 When I did occasionally talk to a correctional officer  
23 and ask him about situations, I found that they uniformly always  
24 did two things. Once they turned to the escort to find out  
25 whether they could answer, and were told they could, they very

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1 carefully said exactly what they had written on a report.

2       So there didn't seem to be any purpose that was to be  
3 gained by further trying to talk to correctional officers and  
4 other staff, although I really regret this. And as a special  
5 master and working in an entirely different environment, I find  
6 that through talking to staff, you're able to verify many  
7 things, find out many things that unfortunately weren't  
8 available to me on this trip.

9       Let me just conclude that sort of methodology by  
10 saying that one night in the town of Gatesville, I was walking  
11 around in the evening, trying to get some exercise, and a young  
12 man came up to me and said, I work out there at one of the  
13 facilities. And you're Allen Breed, aren't you? And I said  
14 yes, I was. And he said, Well, you know, there's a lot of us  
15 that would like to say something, but we're afraid to. I said,  
16 I can fully understand that. But I said, Somebody sometimes  
17 just has to stand up and talk, even though the consequences may

18 not be pleasant. And he says, I don't think you've lived in a  
19 small town very often, or you'd know that your neighbors, your  
20 friends, sometimes your relatives, the people you sit next to in  
21 church, they'd be the people you'd be talking about. So if you  
22 want to survive, you don't talk.

23       So I add that because I think it's terribly important  
24 that correctional officers and other staff -- I'm sure there are  
25 many good people in the Texas Department of Corrections, many

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1 good people, but they are under a pressure and under a culture  
2 that they don't feel that they can share some of their concerns.

3 Q. Did you review some TDCJ policies and procedures, the  
4 written policies and procedures?

5 A. Yes, I reviewed, as set forth in my statement, innumerable  
6 policies and procedures.

7 Q. And were you focused on the policies and procedures in the  
8 areas that you were most concerned about?

9 A. Yes, I was most concerned about use of force procedures,  
10 administrative segregation, protection from harm. And although  
11 I reviewed many others as well, that was where my primary  
12 emphasis was.

13 Q. And you indicated, I think earlier, that in addition you  
14 reviewed departmental records in individual inmate files?

15 A. Yes.

16 Q. Can you evaluate things like the use of force and  
17 protection of prisoners from harm and conditions in

18 administrative segregation by looking only at policies and  
19 procedures and paperwork?

20 A. No. And in my statement I made it very clear that,  
21 generally speaking, I find the policies and procedures are  
22 acceptable. Policies and procedures are merely paper. Unless  
23 the policies and procedures are carried out, they have  
24 absolutely no meaning.

25 One of the things I found out, and I've been involved

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1 in the accreditation process in corrections since its very  
2 beginning, is that very often you will find institutions that  
3 have very excellent policies, but as you move beyond, you'll  
4 find out the degree of implementation, degree of compliance with  
5 those procedures, that it's an entirely different story.

6 Q. Is it fair to say in the last 20 or 30 years, we've moved  
7 to a new stage in corrections where many systems do have  
8 policies and procedures that cover areas of prison operations  
9 that were once not fully covered in written policies and  
10 procedures?

11 A. That weren't fully covered?

12 Q. Yes.

13 A. Yes.

14 Q. So it's a new stage now to look not only at what is written  
15 down in policy and procedure, but how the policy and procedure  
16 is complement and if it is implemented?

17 A. Yes.

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18 Q. I'd like to turn first to your observations and conclusions  
19 in the area of use of force in TDCJ. What observations did you  
20 make about the fact and extent of wrongful uses of force in the  
21 Texas Department of Criminal Justice?

22 A. One of the things that I discovered from the documents that  
23 were shared with me by the Texas Department of Corrections was  
24 the number of incidents, major incidents that have occurred per  
25 1,000 comparing 1992 with 1988, that the number of major

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1 incidents increased 113 percent. The inmate assaults had  
2 increased 61 percent. The staff assaults had increased 61  
3 percent. And the attempted suicides increased 113 percent.  
4 That was a backdrop to my review of what was happening  
5 systemwide. And I found that perhaps because of, although  
6 certainly as a result of, this dramatic increase that there's a  
7 pattern throughout the entire system of attempting to deal with  
8 the problems that they were faced with by using force.

9       As one compares the use of force here in Texas with  
10 other states with a similar population, you'll find that there  
11 is nearly three times as much force reported in Texas as there  
12 would be in other major states like New York, California,  
13 Michigan, Illinois.

14       There's also a culture of force, if I could use that  
15 term. It seems to me as I've tried to analyze it in thinking  
16 back to earlier days when I was very familiar with what was  
17 occurring in adult corrections in Texas, that was that the

18 building tender was a primary method of controlling the inmate  
19 population.

20 With the Ruiz case and the termination of building  
21 tenders, what happened was, many new correctional officers were  
22 hired. Limited training was given, particularly initially.  
23 There -- the fantastic growth that took place in corrections  
24 here in Texas meant that you didn't have that stability of  
25 strong supervisors and middle managers that had come through the

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1 system and taken years before they were promoted. Instead, you  
2 found young people who were promoted almost within the first  
3 year to 18 months that they were in the system.

4 And in attempting to gain control, what was happening,  
5 as I reviewed it and in my opinion, is that correctional  
6 officers began to use the same techniques, the same approaches  
7 that building tenders had previously used.

8 Q. What are those techniques and approaches?

9 A. Well, the best way -- if you want me to go into any  
10 particular detail on that at this juncture, I'll be very happy  
11 to, because there's a number of things that I'd like to share in  
12 that regard.

13 It seems to me that one of the biggest problems in the  
14 Texas system that I saw is that officers can't keep their hands  
15 off prisoners. They want to guide them. They want to push  
16 them. They want to shove them. They do all kinds of things in  
17 which there is a touching or a physical contact. One of the

18 first things you do in corrections is teach people not to touch  
19 unless it's absolutely necessary, and not even then unless  
20 you're sure that you have sufficient manpower, people power to  
21 be able to handle the situation.

22 Q. What's the problem with touching?

23 A. One of the biggest problems -- and it's bigger in prisons  
24 than anyplace else, I think, in our society except in the  
25 streets from which our prisoners come. Out in the streets, you

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1 don't touch somebody unless you want to fight them. And if you  
2 think of a young person growing up on the streets of our urban  
3 areas, having lived under that kind of a culture, coming into  
4 prison, and then having somebody come up to them, very loud,  
5 very profane, most often quite vulgar voice, and start poking  
6 them with their finger and saying, You do this, you do this, the  
7 natural reaction is to respond physically.

8       What happens secondly besides the touching is that  
9 there is a quick response for a correctional officer to put  
10 somebody to the ground. And I'm using a term now that  
11 correctional officers shared with me, because they call it  
12 slamming. This isn't an offender term, it's a correctional  
13 officer's term.

14 Q. Although have offenders picked it up?

15 A. I'm sure they must have. But it's -- somebody is doing  
16 something, and instead of stepping back, instead of calling for  
17 help, instead of getting a supervisor, you slam them to the

18 ground. Now you've got a fight going. And you haven't used the  
19 most important thing, and that is all of the nonaggressive, all  
20 the nonviolent techniques that have been developed over more  
21 recent years as a method of avoiding the very thing that you've  
22 gotten into.

23       There's also a macho kind of concept of -- of  
24 manliness that goes -- that -- you -- you almost have to prove  
25 that you're tougher than the prisoner is. If he uses -- and

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1 you'll find that so many of the assaults -- one of the things  
2 that was really curious to me is how many assaults on staff were  
3 occurring in Texas until I began to analyze the assaults. And I  
4 found that a large percentage of those were verbal assaults.  
5 Now, I don't have any objections whatsoever to some kind of  
6 punishment for offenders using profane language against an  
7 officer or anybody else, but it's hardly justification for  
8 physical force and slamming somebody to the ground. But in some  
9 way without the training that's necessary and the constant  
10 supervision that's necessary, there's a tendency upon  
11 particularly young officers that their very identity has been  
12 attacked if they don't respond physically. So what very quickly  
13 happens in these cases is you get a barroom brawl with officer  
14 and inmate on the ground with other officers rushing up to try  
15 to rescue their peer.  
16 Q. What's your basis for these observations? Where did you  
17 get the information that showed you the pattern of touching, the

18 pattern of slamming very quickly rather than using communication  
19 and other nonviolent methods of resolving the situation?

20 A. Obviously, much of it had to come from the discussions,  
21 interviews that I had with inmates, but it's surprising how much  
22 of it came from the official records themselves, because it's  
23 not uncommon for the correctional officer to write in his report  
24 that he was threatened verbally and therefore slammed the inmate  
25 to the ground, restrained him and then carried out the use of

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1 force report.

2 I also very carefully assessed the medical records to  
3 determine whether or not through this use of force there had  
4 been physical injury. And, unfortunately, in such a very large  
5 number of cases inmates had been injured, often seriously.

6 Q. What makes -- in a correctional setting, what makes the use  
7 of force wrongful?

8 A. Well, it would be wrongful, first, if it was done without  
9 being required to maintain the safety of both staff and the  
10 inmates. Secondly, force is necessary, there isn't any question  
11 about it, and that's why it becomes so critical that we have an  
12 environment in which correctional officers clearly understand  
13 that they are to use every technique possible to avoid force and  
14 that when they have to use force, that they use it in a way  
15 that's fair, sensible, reasonable and safe as possible.

16 In a number of cases, and I think I said that there  
17 was well over 500, probably of those 500 cases, some 70 percent

18 of them I would say excessive force was used. I made one step  
19 further, however, and said, all right, out of those cases in  
20 which, in my opinion, excessive force was used, let's just look  
21 at those cases in which there was several things. One, that the  
22 inmate was already in restraint. That means that he was  
23 handcuffed with his hands behind his back. Secondly, that while  
24 under that restraint he was hit in the face numerous times with  
25 a closed fist. And, third, that there were injuries, often very

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1 serious injuries, that resulted in that. It was those types of  
2 cases that I concentrated on. And I found them in enough of the  
3 units - in fact, all of the units that I visited, although some  
4 units were worse than others in that regard - which gave me the  
5 opinion that I have to share that this is a systemwide problem,  
6 not an isolated situation that occurred in only one facility.

7 Q. Did you make any observations about what might be the  
8 causes of such a systemwide use of unnecessary or excessive  
9 force?

10 A. Well, I think there's a number of things that come to my  
11 mind. One is that I've already mentioned, and that is this  
12 amazing growth in the Texas prison system, the hiring of very  
13 often quite young. It's the only state I believe in the union  
14 that allows 18-year-olds to be hired as correctional officers.  
15 You hire people with absolutely no experience required  
16 whatsoever in any kind of work that might hopefully be a  
17 preparation for the difficult job in corrections.

18 With this and conditions of crowding that exists --  
19 and when I use the word "crowding," I'm talking about so many  
20 bodies in limited space that very often puts people in the wrong  
21 custody classification; that often puts people in places where  
22 they're going to be jeopardized because the appropriate  
23 placement isn't available. It's a combination of all of these  
24 factors that then causes the kind of use of force that I have  
25 been speaking to.

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1 Q. Do you think the stress and strain on the staff is they  
2 attempt to perform all of the duties that are theirs to perform  
3 plays a role in it?

4 A. That's a very good point and I neglected to emphasize,  
5 because in my estimation if there's any one factor which creates  
6 the problems both of undue and excessive use of force, but also  
7 does not provide the degree of protection from harm that I have  
8 found in the Texas system, is the absence of classification  
9 counselors. Now, my statement I indicated that there had -- on  
10 the basis of a legislative decision a reduction in  
11 classification counselors, but that reduction has brought it  
12 down from one classification counselor to several hundred, now  
13 to one to over a thousand inmates. There isn't anybody in the  
14 facility that can act as a coordinator, a planner, the  
15 programmer/arranger, the person who often acts as the advocate  
16 to be sure that the problems that inmates have are addressed.  
17 The fact that was shared with me that these duties have been

18 taken over by others is -- I found at no time was there any  
19 reality to that whatsoever. That there's only two, one of whom  
20 is an administrator's classification type people, in a facility  
21 that has 2500 to 3,000 inmates. They -- their entire time is  
22 spent in just doing the routine paper processing that the  
23 movement in and out requires for a facility of that size.

24       The idea that in some way correctional officers will  
25 do this, they do not see this as their role. They do not see

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